



October 19, 2022

FREEDOM OF INFORMATION ACT REQUEST

National FOIA Office
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2310A)
Washington, DC 20460
Submitted via FOIA Online

Re: FOIA Request for Records Related to EPA's Clean Water Act Section 308 Information Request Regarding the Proposed Rosemont Copper World Complex Mine

Greetings:

This request concerns the U.S. Environmental Protection Agency's (EPA) Clean Water Act Section 308 information request regarding Hudbay Minerals, Inc.'s (Hudbay) proposed Copper World Complex mine. The proposed mine would be located approximately thirty miles southeast of Tucson, Arizona, in the Santa Rita Mountains and involve operations at both the Rosemont and Copper World sites. According to EPA's comprehensive analysis, Hudbay's proposed plan for the Rosemont site would cause significant degradation to waters of the United States.¹ EPA sent an information request to Hudbay earlier this year pertaining to the proposed mine and received Hudbay's response.

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and 32 C.F.R. Part 286, as well as Section 308 of the Clean Water Act, 33 U.S.C. § 1318(b), the Tohono O'odham Nation (Nation) requests the following:

1. ***EPA's Clean Water Act Section 308 information request pertaining to the proposed Copper World Complex mine, and***
2. ***Hudbay's response to EPA's Section 308 information request.***

This request is made on behalf of the Nation, a federally-recognized tribe whose ancestral homelands would be severely the proposed Copper World Complex site. The Nation does not seek any records that are already in the public domain.

¹ Letter from Nancy Woo, Assoc. Dir., Water Div., U.S. Env'tl. Prot. Agency, to Edwin S. Townsley, Operations and Regulatory Div. Chief, S. Pac. Div., U.S. Army Corps of Eng'rs, Environmental Consequences of the Proposed Rosemont Copper Mine: Significant Degradation to Waters of the United States at 34 (Nov. 30, 2017)



INSTRUCTIONS

Under FOIA, the EPA is obligated to provide records in a readily-accessible electronic format and in the format requested. *See* 5 U.S.C. § 552(a)(3)(B) (“In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format.”). The Nation requests that the EPA provide the responsive records in electronic PDF format without any “profiles” or “embedded files.” The EPA should not provide the records in a single or “batched” PDF file. To the extent that a subset of the requested records is readily available, the EPA should provide that subset immediately while continuing to search for additional records to complete the EPA’s response. Disclosed records and information should be conveyed via electronic filesharing system to sgillespie@earthjustice.org and cmiller@earthjustice.org.

If the EPA decides to invoke a FOIA exemption, 5 U.S.C. § 552(b), in response to this request, the EPA must provide sufficient information for the Nation to assess the basis for the exemption, including any interest(s) that would be harmed by release. The EPA must provide a detailed ledger which includes:

1. Basic factual material about each withheld record, including the originator, date, length, general subject matter, and location of each item; and
2. Complete explanations and justifications for the withholding, including the specific exemption(s) under which records (or portions thereof) are withheld and full explanations of how each exemption applies to the withheld materials. Such statements will be helpful in deciding whether to appeal an adverse determination. A written justification may help to avoid litigation.

In addition, if the EPA determines that portions of the records requested are exempt from disclosure, the Nation requests that the EPA segregate the exempt portions and produce the non-exempt, non-privileged portions of such records with other responsive records within the statutory time limit. 5 U.S.C. § 552(a)(6); *Judicial Watch, Inc. v. U.S. Postal Serv.*, 297 F. Supp. 2d 252, 267 (D.D.C. 2004) (holding that an agency “cannot withhold an entire document without describing the mix of privileged and non-privileged information and explaining why it would not be possible to simply redact the privileged materials”) (citing *Vaughn v. Rosen*, 484 F.2d 820, 825 (D.C. Cir. 1973) and *Mead Data Central, Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977)); *see also Jordan v. U.S. Dep’t of Lab.*, 273 F. Supp. 3d 214, 237 (D.D.C. 2017) (affirming agency’s “good faith effort to segregate privileged and non-privileged information”).

Records submitted to the EPA by non-government parties “are not internal agency documents exempt from disclosure.” *Klamath Water Users Protective Ass’n v. DOI*, 189 F.3d 1034, 1038 (9th Cir. 1999). Federal courts have held that any record that leaves a federal government agency and goes to another party cannot be withheld under FOIA Exemption 5, 5 U.S.C. § 552(b)(5). *See Mead Data Central, Inc.*, 566 F.2d at 253; *Senate of Puerto Rico v. Dep’t of Justice*, 823 F.2d 574, 587 (D.C. Cir. 1987); *DOI v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8 (2001) (explaining that Exemption 5 applies only to “inter-agency or intra-



agency” communications). Further, any comments from or to other agencies on the environmental impact of any proposed action may not be withheld as inter-agency documents. See 40 C.F.R. § 1506.6(f).

Relevant Legal Background on the Freedom of Information Act

Section 308 of the Clean Water Act states that “[a]ny records, reports, or information” obtained under the section “shall be available to the public[.]” 33 U.S.C. § 1318(b). FOIA, in turn, was designed to provide citizens with a broad right to access government records. FOIA’s basic purpose is to “open agency action to the light of public scrutiny,” with a focus on the public’s “right to be informed about what their government is up to.” *U.S. Dep’t of Just. v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773 (1989) (quotation omitted). Congress amended FOIA with the Openness Promotes Effectiveness in Our National (OPEN) Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (codified at 5 U.S.C. § 552). In the Congressional findings to the OPEN Government Act, Congress found that “the American people firmly believe that our system of government must itself be governed by a presumption of openness.” Pub. L. No. 110-175, § 2(2). In addition, Congress found that “disclosure, not secrecy, is the dominant objective of [FOIA].” *Id.* § 2(4) (quoting *Dep’t of Air Force v. Rose*, 425 U.S. 352, 361 (1976)). Thus, under FOIA, there is a “strong presumption in favor of disclosure.” *Id.* § 2(3) (quoting *Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991)).

In a March 19, 2009 memorandum to the heads of executive departments and agencies, the U.S. Attorney General underscored that agencies should release records requested under FOIA even if the agency might have a technical excuse to withhold them:

First, an agency should not withhold information simply because it may do so legally. I strongly encourage agencies to make discretionary disclosures of information. An agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption.

Second, whenever an agency determines that it cannot make full disclosure of a requested record, it must consider whether it can make partial disclosure.

Eric Holder, U.S. Att’y Gen., Memorandum for Heads of Executive Departments and Agencies at 1 (March 19, 2009).²

Under the FOIA Improvement Act of 2016, agencies are prohibited from denying requests for information under FOIA unless the agency reasonably believes release of the information will harm an interest that is protected by an exemption. Pub. L. No. 114-185, 130 Stat. 538 (codified at 5 U.S.C. § 552(a)(8)(A)). Agencies will expedite FOIA requests where there is an imminent threat to public health and safety, an urgent need to disseminate information, or other compelling circumstances. See 34 C.F.R. § 5.21(i)(2).

² Available at <https://www.justice.gov/sites/default/files/ag/legacy/2009/06/24/foia-memo-march2009.pdf>.

Fee Waiver Request

The Nation meets the fee waiver requirements of 5 U.S.C. § 552(a)(4)(A) and 32 C.F.R. § 286.12(l), and therefore requests that the EPA provides the records and information identified above without charge. However, if a waiver is not granted, please inform the undersigned of the cost of disclosure if such fees exceed \$25.00. *See* 32 C.F.R. § 286.12(f).

A requester is entitled to a fee waiver when “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the [Federal] government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); 32 C.F.R. § 286.12(l)(1). “Once the FOIA requester has made a sufficiently strong showing of meeting the public interest test of the statute, the burden, as in any FOIA proceeding, is on the agency to justify the denial of a requested fee waiver.” *Ettlinger v. F.B.I.*, 596 F. Supp. 867, 874 (D. Mass. 1984) (citing 5 U.S.C. § 552(a)(4)(B)).

In 1974, Congress amended the judicial review section for the grant or denial of fee waivers under FOIA, replacing the deferential “arbitrary and capricious” standard with the more rigorous *de novo* standard. *See* 5 U.S.C. § 552(a)(4)(A)(vii). Congress explained the change was necessary to address concerns that agencies were using search and copying costs to prevent critical monitoring of their activities:

Indeed, experience suggests that agencies are most resistant to granting fee waivers when they suspect that the information sought may cast them in a less than flattering light or may lead to proposals to reform their practices. Yet that is precisely the type of information which the FOIA is supposed to disclose, and agencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information

132 Cong. Rec. S27,191 (daily ed. Sept. 30, 1986) (statement of Sen. Leahy).

Public interest fee waivers are to be “liberally construed in favor of waivers for noncommercial requesters.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (quoting 132 Cong. Rec. S14,298 (Sen. Leahy)). “[T]he presumption should be that requesters in these categories are entitled to fee waivers, especially if the requesters will publish the information or otherwise make it available to the general public.” *Ettlinger*, 596 F. Supp. at 873 (quoting legislative history). An agency may not refuse a fee waiver when “there is nothing in the agency’s refusal of a fee waiver which indicates that furnishing the information requested cannot be considered as primarily benefitting the general public.” *Id.* at 874. Courts have further held that agencies cannot deny a fee waiver on the basis that any of the requested information is reasonably available to the requester through means other than a FOIA request. *See Project on Mil. Procurement v. Dep’t of the Navy*, 710 F. Supp. 362, 365–66 (D.D.C. 1989) (rejecting Navy’s argument that overlapping information may be found in other Navy documents which other members of the public have because “the substantive contents of even a single document may substantially enrich the public domain and justify a fee waiver”).

EPA applies a six-factor test in determining whether to grant a fee-waiver request where, as here, disclosure of the information is in the public interest. 40 C.F.R. § 2.107(l). As explained below, the Nation satisfies all six requirements.

1. The Subject of the Request Concerns The Operations or Activities of the Government.

The first factor evaluates whether the subject of the request concerns “the operations or the activities of the government.” 40 C.F.R. § 2.107(l)(2)(i). That factor is satisfied here where the Nation seeks records acquired or created by the EPA relating to Hudbay’s proposed Copper World Complex mine. Pursuant to Section 308 of the Clean Water Act, EPA requested information from Hudbay relating to its proposed Copper World Complex Mine. That request and Hudbay’s response will shed light on whether the company is complying with the Clean Water Act. Thus, the requested records concerns “operations or activities of the government,” as required by 40 C.F.R. § 2.107(l)(2)(i).

2. Disclosure Will Contribute Significantly to the Public Understanding of Specific Government Operations or Activities.

The second factor is satisfied when the information is “likely to contribute” to an understanding of government operations or activities. *Id.* § 2.107(l)(2)(ii). The disclosable portions of the requested records must be meaningfully informative about government operations or activities in order to be “likely to contribute” to an increased public understanding of those operations or activities. Disclosure of information that is already in the public domain is not meaningfully informative, as nothing new would be added to the public’s understanding. 32 C.F.R. § 286.12(l)(2)(ii)(A); *Judicial Watch, Inc. v. Dep’t of Just.*, 365 F.3d 1108, 1127 (D.C. Cir. 2004). The focus must be on the benefit to be derived by the public, rather than the benefit to be derived by the requester. *See, e.g., Ettlinger*, 596 F. Supp. at 876 (explaining that benefit to “a population group of some size, which is distinct from the requester alone, is sufficient”); *Carney*, 19 F.3d at 814 n.4 (explaining that “public” requires a sufficient “breadth of benefit” beyond the requester’s own interests). A requester’s expertise in the subject area, as well as his or her ability and intention to effectively convey the information to the public, must also be considered. 32 C.F.R. § 286.12(l)(2)(ii)(B); *Cnty. Legal Servs. v. Dep’t of Hous. & Urban Dev.*, 405 F. Supp. 2d 553, 557 (E.D. Pa. 2005) (holding legal services groups was entitled to a fee waiver and noting that, while the requester’s “work by its nature is unlikely to reach a very general audience,” “there is a segment of the public interested in its work”).

The legislative history of FOIA makes clear that a request contributes “significantly” to public understanding where the information requested will support “public oversight of agency operations.” 132 Cong. Rec. H29617 (daily ed. Oct. 8, 2986) (statements of Reps. English and Kindness). “A requester is likely to contribute significantly to the public understanding if the information disclosed is new; supports public oversight of agency operations, including the quality of agency activities. . . ; or otherwise confirms or clarifies data on past or present operations of the government.” *Id.*; *see also McClellan*, 835 F.2d at 1284–86.

The Clean Water Act explicitly requires EPA to provide the public with any record, reports, or information obtained under Section 308 of the Act. That obligation reflects the fact that Section 308 requests, and the subsequent response, provide information to determine whether a company is complying with its Clean Water Act obligations. Disclosure of the requested records and information will, thus, foster a better public understanding of the EPA's information request and whether Hudbay's proposed Copper World Complex is complying with the Clean Water Act. The Nation intends to disseminate these records and information to its tribal members, as well as other interested tribes, including the Hopi Tribe and the Pascua Yaqui Tribe, local governments, members of environmental groups, and members of the general public who are concerned about the proposed mine's severe, irreversible, and irreparable impact on cultural, religious, and natural resources.

Furthermore, the Nation has been a leading public voice in the debate over the Copper World Complex and the EPA's administration of its CWA authority over the waters in the area. The Nation has the unique expertise to analyze, summarize and disseminate the information to media outlets and the public.³ Release of the information may also empower members of the public to engage in public advocacy efforts to protect and conserve the waters, lands, wildlife, and cultural heritage at stake. Thus, disclosure of this information will significantly contribute not just to the Nation's understanding, but to the understanding of a broad audience of persons who are interested in the subject matter.

Finally, as noted above, disclosure of the requested records is required by the Clean Water Act. Furthermore, the Nation requests only those records and information that are not already in the public domain. Thus, disclosure of the requested information would be meaningfully informative about government operations and Hudbay's activities and would thereby add significantly to the public understanding of those operations and activities.

3. Disclosure of the Information Will Contribute to an Understanding of EPA's Information Request and Hudbay's Activities.

The third factor focuses on whether "disclosure of the requested information will contribute to "public understanding." 40 C.F.R. § 2.107(l)(2)(iii). The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. *Id.*

³ See e.g., Tony Davis, *Army Corps Reverses Pledge to Consult With Tribes Over Rosemont Mine Authority*, ARIZ. DAILY STAR, (Jan. 20, 2021), https://tucson.com/news/local/army-corps-reverses-pledge-to-consult-with-tribes-over-rosemont-mine-authority/article_a642456d-d834-5d52-bb1e-95618824adc0.html; Hannah Northey & James Marshall, *Army Corps Taps Trump Rule, Stiff-arms Tribe on Ariz. Mine*, E&E NEWS (Apr. 1, 2021), https://www.eenews.net/greenwire/2021/04/01/stories/1063729049?utm_campaign=edition&utm_medium=email&utm_source=eenews%3Agreenwire; Gabriela Maya Bernadette, *"Ours is the Land" Highlights Tohono O'odham Fight Against Proposed Mine*, INDIAN COUNTRY TODAY (Feb. 29, 2016), <https://indiancountrymedianetwork.com/news/environment/ours-is-the-land-highlights-tohono-oodham-fight-against-proposed-mine/>.



That factor is met here given the far-reaching impacts of the proposed Copper World Complex on the Nation, other Native American tribes, and the public at large. Disclosure of the requested information will contribute to a greater understanding of whether Hudbay is complying with its obligations under the Clean Water Act.

4. Disclosure of the Information Will Contribute Significantly to the Public's Understanding of the Proposed Copper World Complex.

The fourth factor focuses on whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities. 40 C.F.R. § 2.107(l)(2)(iv). The public's understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, must be enhanced by the disclosure to a significant extent.

That factor is satisfied here given the fact that Hudbay commenced operations at its proposed Copper World Complex earlier this year. The requested information will provide a thorough understanding of whether those activities comply with the Clean Water Act, which prohibits the unpermitted discharge of any pollutants into waters of the United States.

5. The Nation Has No Commercial Interest in the Requested Records and Information.

In determining whether to grant a fee waiver, EPA assesses whether the requester has a commercial interest that would be furthered by the requested disclosure. 40 C.F.R. § 2.107(l)(2)(v). The Nation has no commercial interest in the disclosure of the records and will realize no commercial benefit or profit from the disclosure of the requested records.

6. The Nation Seeks The Requested Information On Behalf of the Public Interest

The sixth factor focuses on whether the "public interest is greater in magnitude than that of any identified commercial interest in disclosure." 40 C.F.R. § 2.107(l)(2)(vi). Here, the Nation has no commercial interest in the information. By contrast, the Nation seeks the records in furtherance of the public interest, including access to government records, disclosure forms, educating its tribal members, other tribes, local governments, environmental groups, and the general public about the proposed Rosemont Copper World Complex and ensure Clean Water Act protections.

As demonstrated above, the Nation meets each of the regulatory requirements for a fee waiver. If you have any questions in this matter, please contact me via email at sgillespie@earthjustice.org.

Sincerely,

Stu Gillespie



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